[Pursuant to a petition for writ of mandate, the superior court has reversed that portion of the decision that held that a notice of intent to serve an adverse action on an employee did not provide formal notice of the disciplinary action within the statutory period. The superior court's decision was affirmed by the Third District Court of Appeal on December 20, 2004. A petition for review was filed with the California Supreme Court on January 28, 2005.]

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **PAUL SULIER** From demotion from the position of Correctional Sergeant to the position of Correctional Officer with California Substance Abuse Treatment Facility, Department of Mental Corrections at Corcoran	)	SPB Case No. 01-2626 **BOARD DECISION** (Precedential) **No. 02-09** September 11-12, 2002

APPEARANCES: Mark Kruger, attorney, on behalf of appellant, Paul Sulier; James D. Madison, Staff Counsel, on behalf of respondent, Department of Corrections.

BEFORE: Ron Alvarado, President; William Elkins, Vice President; and Florence Bos, Member.

DECISION

This case is before the State Personnel Board (Board) after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ). Respondent Department of Corrections (Department) demoted appellant Paul Sulier (Sulier) from the position of Correctional Sergeant to the position of Correctional Officer (CO) based on allegations that he provided confidential information about one inmate to another inmate, with the knowledge that doing so put the first inmate's life at risk. Respondent also alleged that near the end of July 2000, appellant approached a CO and, in reference to an investigation

that the Department was conducting concerning the first allegation, stated that, "If I ever find out it was a cop that gave me up, I will never let go."

In this Decision, the Board finds that the Department did not serve appellant with the Notice of Adverse Action within the one-year limitations period set forth in Government Code section 3304(d). Because the disciplinary action was not served in a timely manner, the disciplinary action must be dismissed.

BACKGROUND

Employment History

Appellant began state service in April 1990 as a CO. He promoted to the position of Correctional Sergeant at the Substance Abuse Treatment Facility (SATF) on March 27, 2000. Appellant has no history or disciplinary action.

Factual Summary

The Board concurs with the ALJ's detailed factual findings regarding the underlying charges, as set forth in the attached Proposed Decision, and need not repeat them here, given our conclusion in this case.

(The Investigation and Notice of Adverse Action)

Correctional Sergeant Erick Smith (Smith) sent a request for an investigation concerning appellant's alleged misconduct to the Warden's office on July 10, 2000. On July 21, 2000, the Warden's Office assigned the matter to the Office of Internal Affairs for investigation. On July 2, 2001, the Department mailed a notification letter to appellant's home address, with return receipt requested, stating its intent to take disciplinary action against him. That letter stated:

> You are hereby notified that the investigation into your behavior has been completed. The investigation sustained the allegations that on July 7, 2000, you provided Inmate Ohlund, K-68599 with confidential information regarding Inmate Owens, K-57374.
>
> Therefore, a decision has been made to take disciplinary action against you. The recommended penalty is a one-step demotion to Correctional Officer.
>
> You may anticipate formal adverse action papers to be served on you within the next thirty (30) days.

Appellant's wife signed for the letter on July 7, 2001.

The Department served appellant with the formal Notice of Adverse Action (NAA) on August 2, 2001, demoting appellant to the position of Correctional Officer. The NAA alleged that appellant's actions constituted violations of Government Code section 19572, subdivisions (d) inexcusable neglect of duty, (m) discourteous treatment of the public or other employees, and (t) other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment.

Procedural Summary

Appellant filed an appeal of the NAA with the Board, and a hearing was conducted before an ALJ. During the course of the hearing, appellant moved to dismiss the disciplinary action on the grounds that he had not been served with the NAA within the limitations period set forth in the Public Safety Officers Procedural Bill of Rights Act (POBOR), Government Code section 3304(d). The ALJ denied appellant's motion, and subsequently issued a Proposed Decision sustaining the demotion. The Board rejected the Proposed Decision in order to decide the matter itself.

ISSUES

1. Whether the Department complied with the limitations period set forth in Government Code section 3304(d) when it mailed a Notice of Intent letter to appellant within one year of commencing its investigation, but did not serve a formal Notice of Adverse Action on appellant concerning the same misconduct for more than one year after its investigation had commenced?

2. If so, whether the allegations were proven by a preponderance of the evidence?

DISCUSSION

(The Board May Exercise Jurisdiction Over Alleged POBOR Violations)

The Department contends that the Board may not assert jurisdiction over alleged POBOR violations, in that the statutory scheme provides that initial jurisdiction over such matters resides in the superior court. We disagree.

In its precedential decision, Gayle McCormick,[1] the Board concluded that it could assert initial jurisdiction over alleged POBOR violations. The Department filed an appeal of that decision to the Lassen County Superior Court.[2] In its subsequent decision, the court specifically determined that the Board was authorized to exercise initial jurisdiction over alleged POBOR violations. That decision is currently on appeal to the Third District Court of Appeal.[3] Because no order has been issued staying implementation of the

[1] (2000) SPB Dec. No. 00-05.

[2] Case No. 34909.

[3] Case No. CO40762.

Board's findings in McCormick, we conclude that we may properly exercise jurisdiction over appellant's contention that his POBOR rights have been violated.[4]

[4] See Code Civ. Proc., § 1094.5(g).

(The Notice of Adverse Action Was Not Timely)

The limitations period within which peace officers, including COs, must be served with a notice of proposed disciplinary action is set forth in Government Code section 3304, subdivision (d), which provides, in pertinent part:

> Except as provided in this subdivision and subdivision (g), no punitive action … shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency's discovery by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct. This one-year limitation period shall apply only if the act, omission, or other misconduct occurred on or after January 1, 1998. In the event the public agency determines that discipline may be taken, it shall complete its investigation and notify the public safety officer of its proposed disciplinary action within one year … (emphasis added.)[5]

According to the Department, because the statute only requires that the public safety officer receive notice of the proposed disciplinary action within one year, and because appellant received such notice via the Notice of Intent letter, the Department fully complied with the provisions of the statute. Appellant, on the other hand, maintains that the clear intent of the statute was to require that Departments serve peace officers accused of misconduct with the actual formal notice of disciplinary action within the one-year limitations period, and that a contrary finding would frustrate the very purpose of the statute. We agree with appellant's position.

A fundamental rule of statutory construction requires that when construing a statute, the court must select the construction that comports most closely with the apparent intent

[5] Government Code section 19635 sets forth a three-year limitation period within which state employers must take formal disciplinary action against state civil service employees.

of the Legislature, with a view to promoting, rather than defeating, the general purpose of the statute.[6] Here, the construction urged by the Department contravenes the legislative intent underlying the limitations period.

Under the Department's theory, so long as the state employer notifies the peace officer of its intent to initiate disciplinary action against the peace officer within one year of an appropriate agent of the employer being notified of alleged misconduct, the employer thereafter presumably has a full three years, pursuant to Government Code section 19635, in which to actually initiate formal disciplinary action against the employee. So, for example, in this case because the Department notified appellant on July 7, 2001, of its intent to initiate disciplinary action against appellant, it has complied with the one-year limitations period set forth in POBOR, and no formal disciplinary action need be taken against appellant until July 9, 2003, three years after the date that the Warden was notified of the misconduct.

We simply cannot agree with the Department that this is the result that the Legislature intended when amending Section 3304(d) to require that the employing department "complete its investigation and notify the public safety officer of its proposed disciplinary action within that year…" Clearly, the Legislature intended that the employing department be required to actually serve the peace officer with the formal NAA within the one-year limitations period, as any other construction renders the one-year limitations period essentially meaningless.

[6] Townzen v. County of El Dorado (1998) 64 Cal.App.4th 1350, 1355-56, *as modified*. See also Ream v. Superior Court (1996) 48 Cal.App.4th 1812, 1817-18.

One of the primary purposes of a statute of limitations is to prevent any injustice that might result from an individual having to defend against stale claims, after memories have faded and evidence has been lost.[7] Here, acceptance of the Department's construction would result in appellants' being required to defend themselves against allegations that occurred more than one-year before the date that they are served with an NAA. The Board find it implausible that this is the result the Legislature intended when amending Section 3304(d) to include a one-year limitations period. Indeed, in opposing the legislation that amended Section 3304(d) to include a one-year limitations period, the Board specifically informed that Legislature that the amendment would result in abandonment of the three-year limitations period set forth in Section 19635, in favor of the one-year limitations period set forth in the proposed Section 3304(d).[8] Despite such warnings, the legislation was enacted.

Neither does the statutory language support the Department's position. Any NAA served on a state employee is a notice of proposed disciplinary action, in that a "proposed" disciplinary action must be served within five working days prior to its effective date, so that the employee has an opportunity to have the "proposed" disciplinary action reviewed by an impartial Skelly officer during a pre-deprivation hearing. The Skelly officer has the authority to modify or revoke the "proposed" action, or to recommend a modification or revocation to the appointing authority.[9] The "proposed" disciplinary action contemplated by Section 3304(d) is, therefore, the formal NAA required by Section 19574.

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[7] Romano v. Rockwell Internat., Inc. (1996) 14 Cal.4th 479, 488.

[8] See Assembly Bill 1436, Senate Rules Committee Floor Analysis, "Arguments in Opposition," June 17, 1997.

[9] See Cal. Code Regs., § 52.3.

In short, the Department's proposed construction would lead to the absurd result that, having timely notified the peace officer of its intent to take disciplinary action against him, the state employer thereafter has the same three-years in which to take disciplinary action against the individual that existed prior to the amendment of Section 3304(d). This is not a result that the Board is inclined to accept as reasonable, nor is it the result that we believe the Legislature intended, as it renders the amendment to Section 3302(d) virtually meaningless. As a result, the Board finds that because the Department served the NAA on appellant more than one year after the Warden was notified of possible misconduct by appellant, the action must be revoked as untimely.[10]

CONCLUSION

Absent circumstances not applicable here, Government Code section 3304(d) requires state departments to serve the formal NAA on any peace officer accused of misconduct within one-year of the date of discovery of the misconduct by a person authorized to initiate an investigation into the wrong-doing. Here, the Notice of Intent letter that the Department mailed to appellant was not sufficient to comply with the notice provisions of Section 3304(d). Instead, the Department was required to serve the actual NAA on appellant within that one-year limitations period. Because the Department failed to do so, the demotion taken against appellant must be revoked.

[10] The Board notes the seriousness of the allegations against appellant, but is compelled by the law to dismiss those allegations on the grounds that appellant was not timely served with the formal notice of the allegations as required by Government Code section 19574 and Title 2, California Code of Regulations, section 52.3.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. The demotion of Paul Sulier from the position of Correctional Sergeant to the position of Correctional Officer in SPB Case No. 01-2626 is revoked;
2. Pursuant to Government Code section 19584, the Department of Corrections shall pay to Paul Sulier all back pay, interest, and benefits, if any, that would have accrued to him had he not been demoted from the position of Correctional Sergeant to the position of Correctional Officer;
3. This matter is hereby referred to the Chief Administrative Law Judge and shall be set for hearing on written request of either party in the event the parties are unable to agree as to the salary and benefits due appellant.
4. Pursuant to Government Code § 19582.5, this decision is certified for publication as a precedential decision.

STATE PERSONNEL BOARD.[11]

Ron Alvarado, President
William Elkins, Vice President
Florence Bos, Member

* * * * *

[11] Member Sean Harrigan did not participate in this Decision.

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on September 11-12, 2002.

_____
Walter Vaughn
Executive Officer
State Personnel Board

[Sulier-dec]